



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
No. 78-1856

ROLAND T. DORL,

Petitioner,

vs.

FOSTER WHEELER CORP.,

Respondent.

R E P L Y B R I E F

JONATHAN A. WEISS, Esq.
Legal Services for the
Elderly Poor
2095 Broadway, Rm. 304
New York, NY 10023
(212) 595-1340

Attorney for Petitioner

August 22, 1979.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
No. 78-1856

ROLAND T. DORL,

Petitioner,

vs.

FOSTER WHEELER CORP.,

Respondent.

R E P L Y B R I E F

JONATHAN A. WEISS, Esq.
Legal Services for the
Elderly Poor
2095 Broadway, Rm. 304
New York, NY 10023
(212) 595-1340

Attorney for Petitioner

August 22, 1979.

INDEX

	<u>Page</u>
INTRODUCTION	1
I <u>The Record Presents a Complete Basis for a Petition for Certiorari.</u>	2
II <u>This Court Has Clear Jurisdiction.</u>	4
III <u>The Irrefutable Facts Demonstrate that the Petitioner Had a Prima Facie Case but Was Never Allowed His Day in Court.</u>	6
CONCLUSION	8

INTRODUCTION

In an apparent attempt to distract this Court from the main issues in this case, the respondent attempts to attack the state of the record, raise subsidiary factual matters, and suggest the case is not ripe for review. To refute the points one after the other, although possible, would be to sink to that low level of discourse; to demonstrate the factual inaccuracy of many of the propositions would be to lose the forest for the trees. Instead, we urge this Court to grant certiorari on the crucial issues this case poses - among them: (1) can a Circuit Court, on no basis, substitute new findings of fact to uphold the denial of a pro se plaintiff's day in District Court; (2) can a claim of retaliation, based on facts in the record, be disregarded and dismissed in the context of

employment discrimination at a motion for summary judgment? To illustrate how respondent tries to distract by misleading characterization and misstatements of facts, we will touch briefly on a couple of points hopefully not to distort our focus, but instead to suggest why all of respondent's ploys should be ignored and this case's important issues addressed.

I

The Record Presents a Complete Basis for A Petition for Certiorari.

The petitioner has presented a full appendix to this petition and it obviously can predicate the issuance of a writ. The record, present in the Court below, would further flesh out the case and is available to this Court. Respondent attempts to avoid these ineluctable facts by referring to what

was and was not in the final and official record in the Court of Appeals. Yet it is wholly uncontroverted that the petitioner filed the timely 1974 Petitions for Appointment of Counsel and Perpetuation of Testimony. Respondent has always been aware of that fact and the following facts: (1) they defended against the 1974 petitions in the Southern District; (2) the respondents answered the amended 1978 court complaint which acknowledged the filing of the 1974 petitions; (3) Judge Motley's November 6, 1974 letter to petitioner and her opinion of June 7, 1976 (Exhibits C & D in the Appendix to the Petition for Certiorari), and all exhibits, a total of about two dozen, were part of the petitioner's 1977 motion for partial summary judgment and were also part of the 1978 Reply to

Respondent's Motion for Summary Judgment; (4) excerpts from these documents were read verbatim by petitioner, then pro se, into the various depositions taken in January, 1978; (5) the full text of Judge Motley's 1974 letter that there was "an active case sub judice" (i.e., under consideration) was also recorded in depositions, not any part of which were stricken from the record in the Third Circuit. The record is complete and respondents have always known its contents and their reliance.

II

This Court Has Clear Jurisdiction.

Respondent has not challenged the jurisdiction of the Supreme Court in this matter. Accordingly, its powers include a full review of all lower court action, including those related to the

removal of some exhibits from the record on appeal, which action took place without the respondent or the Third Circuit giving any adequate reasons (and now vainly attempting to bootstrap a substitute finding of facts on their official absence in the Third Circuit). We have a decision on a purposely inadequate record and no basis in fact. Cf., Thompson v. City of Louisville, 362 US 199; Garner v. Louisiana, 368 US 157, 163.

It should be pointed out that the pro se petitioner was given no opportunity for oral argument in the Third Circuit or the District Court. Indeed, respondent's motion to the Appellate Court to strike certain exhibits did not set forth any facts at all as to why some exhibits were part of the record and some were not. A full record, nonetheless, exists, undisturbed, in

depositions of the petitioner. This Court has the power to see what needs to be seen and the jurisdiction to act.

III

The Irrefutable Facts
Demonstrate that the
Petitioner Had a
Prima Facie Case but
Was Never Allowed His
Day in Court.

Among many undisputable facts are:

(1) Petitioner was replaced by a younger employee after many years of petitioner's service which at least switches the burden of persuasion at trial to defendant under the Age Discrimination in Employment Act of 1967. Petitioner was never given the chance to demonstrate that that was in fact at the root of his replacement nor the retaliation that occurred when he objected.

CONCLUSION

For the foregoing reasons, and the reasons enumerated in the petition for writ of certiorari, in the interest of justice; following the concern for proper federal appellate supervision, and in order to achieve the result of effectuating proper procedures to enforce federal policies and statutes against discrimination, certiorari should issue in this case.

DATED: NEW YORK, NEW YORK
August 22, 1979.

Respectfully submitted,

JONATHAN A. WEISS, Esq.
Legal Services for the
Elderly Poor
2095 Broadway, Rm. 304
New York, NY 10023
(212) 595-1340

Attorney for Petitioner

(2) Defendant admitted the "warning" letter mentioned in the Third Circuit opinion meant nothing yet the firing letter referred to it after a complaint had been filed.

(3) Affidavits and documents were filed detailing the retaliation and not refuted. This fact alone should have prevented summary judgment.

Just these factors should have allowed the pro se petitioner his day in court. (Pro se petitioner offered a long list of other items in his reply brief in the Third Circuit whose effect is cumulative and illuminating in this context.) He sought his day in Court, was denied it, and now asks this Court to provide for it.